Commonwealth of Kentucky
Supreme Court

Case No. 2014-SC-000243-DR

JOHN C. MARTIN **APPELLANT**

v.

Appeal from Anderson Circuit Court
Hon. Charles R. Hickman, Vice-Chief Regional Circuit Judge
Indictment No. 2009-CR-00042

COMMONWEALTH OF KENTUCKY **APPELLEE**

BRIEF FOR COMMONWEALTH

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief for the Commonwealth was mailed 1st class U.S. mail, postage prepaid this the 10th day of August, 2015, to: Hon. Charles R. Hickman, Vice-Chief Regional Circuit Judge, Chief Circuit Judge, 401 Main Street, Suite 401, Shelbyville, KY 40065; via state-messenger mail to: Hon. Margaret A. Ivie, Assistant Public Advocate, Department of Public Advocacy, 207 Parker drive, Suite 1, LaGrange, KY 40031; and by agreement via electronic mail to Hon. Laura Donnell, 544 Main Street, Shelbyville, KY 40065. I further certify that the record on appeal was returned to the Clerk of this Court on the same day.

CHRISTIAN K. R. MILLER
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INTRODUCTION

John Martin entered a guilty plea to sex crimes and later filed a Motion to Amend his sentence, which was denied and appealed. Following the Court of Appeals's affirmance of that denial, Martin sought and was granted discretionary review on two issues.

ORAL ARGUMENT STATEMENT

The Commonwealth does not request oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

This case is before this Court on a discretionary review grant for two issues: (1) can the Court of Appeals construe an un-characterized "Motion to Amend Sentence" as an RCr 11.42 motion; and (2) does a defendant suffer a Fair Warning violation when the legislature alters the revocation proceedings for a sex offender's conditional discharge? Martin's brief before this Court abandons the conditional discharge issue. Martin now only requests that he be permitted to return to the Circuit Court and "withdraw or amend his motion [to amend sentence.]" (Aplt's Brf. at 13). As this change in argument and requested relief is substantially different than all other stages of this litigation, a detailed counterstatement of the case is laid out below.

On August 4, 2009, John Martin was indicted by the Anderson Circuit Court Grand Jury for one count of first-degree sodomy, six counts of first-degree sexual abuse, two counts of second-degree sodomy, two counts of third-degree rape, and one count of third-degree sodomy. (TR Vol. I, 1-5).[1] On January 31, 2011, the morning Martin was to be tried by jury, Martin accepted the Commonwealth's offer on a plea of guilty and moved the court to enter a guilty plea on counts two through 11, dismissing counts one and 12. (TR Vol. II, 205-208). *See also* (VR 1/31/11, 9:56:45, 10:49:10).

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[1] Counts one and 10 were later amended to reflect different dates during which the crimes were committed. (TR Vol. II, 203-204).

Under the offer's terms, Martin was to receive: 10-year sentences on counts two through nine, all to run concurrent for 10 years; a 10-year sentence on count 10, to run consecutive to counts two through nine; and a three-year sentence on count 11, to run consecutive to counts two through 10, for a total imprisonment sentence of 23 years. (TR Vol. II, 206).

Shortly before final sentencing, Martin filed a motion to withdraw his guilty pleas. (TR Vol. II, 228). He claimed he did not understand the charges against him, the evidence against him, and the consequences of the plea agreement. (*Ibid.*). The trial court heard the motion on April 19, 2011.

At the hearing, the Commonwealth noted that part of the bargain included dismissing crimes that had been pending against Martin in Shelby County. (VR 4/19/11, 11:09:45). Martin did not object to those charges being dismissed when the parties had traveled there days before to have the charges dismissed as part of the deal. (*Ibid.*).

The trial court noted it had reviewed the guilty plea colloquy and was "certain" the plea was made knowingly, intelligently and voluntarily, and denied the motion. (VR 4/19/11, 11:10:40). The trial court then conducted sentencing. A judgment and sentence was entered on April 21, 2011, sentencing Martin to the agreed-to 23-year sentence. (TR Vol. III, 231-233).

Over a year later, on May 4, 2012, Martin, acting *pro se*, filed a "Motion to Amend Sentence". (TR Vol. II, 244-245). In that motion, Martin

argued that because a jury did not find him guilty, pursuant to *Apprendi*, he should not be subject to a five-year conditional discharge:

> There are a great number of cases in which said courts of superior jurisdiction have held that any enhancement to the statutory length of a sentence, such as this Conditional Discharge, must be presented in an indictment, tried by a jury, a d [sic] the enhancement must be levied by the jury after finding guilt beyond a reasonable doubt. This is in keeping with the "due process clause" of the United States Constitution as enumerated in Amendment V and the jury trial guarantee of Amendment VI, wherein the courts have decreed that ". . . any fact that increases the maximum penalty for a crime MUST (emphasis added) be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt. . ." .
>
> Likewise, the U.S. Constitution, Amendment XIV, provides for the proscription of any deprivation of liberty without due process of law and Amendment VI guarantees that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. It has also been decreed that it is ". . . unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt. . .".
>
> In the case of Apprendi v New Jersey, 120 SCt 2348, Justice Stephens of the U.S. Supreme Court held that Amendment XIV's due process clause has required all the foregoing constrictions.
>
> The U.S. Supreme Court, in Apprendi supra, and Jones v. United States, 119 SCt 1215 has decreed that any enhancement beyond statutory limits must be included in an indictment, tried

> by a jury, and the enhanced punishment must be assigned by the jury.
>
> The Kentucky Supreme Court, in Bailey v Commonwealth, 70 SW 3rd 414, states ". . . the trial judge does not have the discretion to alter the sentence of a defendant pleading guilty. . .".
>
> Likewise, in Ladriere v Commonwealth, 2009 SC 758 MR virtually restates all of the foregoing. There are a vast number of cases in which the enhancements have been vacated due to constitutional constraints.
>
> Wherefore Movant moves this Honorable Court to vacate the Conditional Discharge portion of his sentence, per the decisions of Courts of Superior Jurisdiction.

(TR Vol. II, 244-245).

The Commonwealth filed a brief response, indicating the motion was untimely and *not* made pursuant to CR 60.02:

> Defendant pled guilty to several crimes and accepted a sentence of 23 years. The period of post-incarceration supervision of KRS 532.043 is mandatory. *Defendant had a multitude of avenues for relief under CR 59.05, and he still may be able to make a motion under CR 60.02, among other avenues of relief.* However, without addressing the merits of Defendant's motion, the Commonwealth believes that it is untimely, and should be summarily overruled, as this court no longer has jurisdiction over the matter.

(TR Vol. II, 246) (emphasis added).

The trial court then ruled on the motion in an order entered June 18, 2012:

> Martin argues in his pro se motion that the five years of conditional discharge ordered in his Judgment and Sentence on a Plea of Guilty entered on April, [sic] 21, 2011 is unconstitutional as it violates his due process rights.
>
> Martin plead guilty and was sentenced to serve twenty-three years for the following offenses: six counts of Sexual Abuse, 1st degree, two counts of Sodomy, 2nd degree, one count of Rape, 2nd degree, and one count of Rape, 3rd degree. KRS 532.043(1-2) imposes a five year period of postincarceration supervision on "any person convicted of, pleading guilty to, or entering an Alford plea to a felony offense under KRS Chapter 510 . . ." and other sexual offenses.
>
> All of the offenses that Martin pled guilty to were sex crimes found in KRS Chapter 510, and therefore, pursuant to the terms of KRS 532.043(2), Martin is subject to five years of postincarceration supervision. [footnote omitted.]
>
> Martin was sentenced in accordance with the provisions of KRS 532.043, and this condition was included on the third page of his Judgment entered on April 21, 2011. The Court finds no error and no grounds upon which to amend Martin's sentence.

(TR Vol. II, 249) (paragraph breaks added).

Martin tendered a notice of appeal on June 28, 2012, and motions to proceed *in forma pauperis* and for appellate counsel on July 3, 2012. (TR Vol. II, 254 ,263, 267). The trial court granted the latter two requests on July 17, 2012. (TR Vol. II, 272).

On September 28, 2012, the Department of Public Advocacy filed a motion with the Court of Appeals to withdraw as counsel for Martin, stating:

> An attorney with the DPA has reviewed the record in this case and has determined that this "post-conviction proceeding . . . is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." KRS 31.110(2)(c). Thus it appears that the Appellant has "no further right to be represented by counsel under the provisions of [the Public Advocacy Statutes." KRS 31.110(2)(c).

On October 24, 2012, the Court of Appeals denied the DPA's motion and ordered it to file briefs in three similar cases: *John Martin v. Commonwealth*, 2012-CA-1172-MR; *Jonathan McDaniel v. Commonwealth*, 2012-CA-1299-MR; and *David L. Deshields v. Commonwealth*, 12-CA-1513-MR.

In Martin's Appellant's Brief at the Court of Appeals, he raised three claims, none of which were included in his Motion to Amend: (1) his plea was not knowing, intelligent, and voluntary; (2) the five-year conditional discharge on five of his 10 charges violated the *Ex Post Facto* clause as he was only subject to a three-year conditional discharge on those crimes; (3) the change in revocation procedures for conditional discharges constituted a Fair Warning violation. (Brf. at 3, 5, 12).

The Commonwealth's brief in its Counterstatement referred to Martin's Motion to Amend as an RCr 11.42 motion. (Brf. at 1). In its Argument, the Commonwealth argued that all three issues were barred

because they had not been presented to the trial court for review. (Brf. at 6, 8, 10). Alternatively, the Commonwealth proffered substantive arguments against Martin's claims.

On April 4, 2014, the Court of Appeals issued one opinion on the three consolidated cases of *Martin, Deshields, and McDaniel*, affirming all three trial court opinions. Initially, in deciding what standard of review to utilize, the court held that the Motion to Amend Sentence was an RCr 11.42 motion. (Slip Op. at 3-4).

The court then held that the knowing, voluntary, and intelligent nature of the pleas was not before it and would not be addressed. (Slip Op. at 4). The court then addressed the conditional discharge "due process" claim, and found none had occurred. (Slip Op. at 4-6). Finally, the court rejected Martin's *Ex Post Facto* argument, noting that "at least two of his charges render him subject to supervision. The period of supervision was for five years – regardless of the number of charges for which supervision was mandated. Therefore, there is no merit to this argument." (Slip Op. at 6-7).

Martin then filed a motion for discretionary review with this Court. Martin raised two claims: (1) can the Court of Appeals construe an un-characterized "Motion to Amend Sentence" as an RCr 11.42 motion?; and (2) does a defendant suffer a Fair Warning violation when the legislature alters the revocation proceedings for a sex offender's conditional discharge?

Martin's brief on discretionary review drops the second claim.

Additional facts will be discussed as necessary below.

ARGUMENT

This appeal should be dismissed as no justiciable claim is presented. Martin is serving a 23-year sentence. His trial court motion concerned only the constitutionality of potential revocation proceedings under a five-year conditional discharge that he may, at some point in the future, be subject to. Martin was not (and is not) serving his conditional discharge and, more importantly, no one has ever sought to revoke Martin under the conditional discharge.

It is uncertain that Martin will ever serve this conditional discharge. It is more uncertain that Martin will ever be subject to revocation proceedings. And it is even more uncertain that if Martin were ever subject to revocation proceedings that he would actually be revoked. Accordingly, Martin's claim is speculative and unripe. This case should be dismissed.

Likewise, the case should be dismissed as moot. Martin has dropped his substantive claim and does not argue that the trial court's order is erroneous at all. Due to his failure to claim any error with the order from which he is appealing, Martin's case is now moot, and a summary opinion vacating the Court of Appeals's opinion and affirming the trial court's order resolves any issues Martin has with the Court of Appeals's opinion.

Finally, Martin's procedural claim against the Court of Appeals's opinion also fails because Martin's trial court motion was un-characterized

and explicitly relied upon no rule, thus the Court of Appeals never "re-characterized" a CR 60.02 pleading to a RCr 11.42 pleading.

I. The Claim is not Ripe.

Martin's appeal is not properly before this Court because his motion raised an issue that is not ripe. Ripeness may be raised at any time, as it concerns the justiciability of a claim:

> The issue of ripeness has not been raised heretofore, but is an element of a justiciable motion or claim. "Questions that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy. Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it."

Nordike v. Nordike, 231 S.W.3d 733, 739-740 (Ky. 2007) (quoting *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005)). *See also W.B. v. Comm., Cabinet for Health and Family Services*, 388 S.W.3d 108 (Ky. 2012) (court can raise ripeness claim *sua sponte*).

Ripe claims require a live case or controversy, not a potential or hypothetical controversy. ". . . [T]he ripeness doctrine requires the judiciary to refrain from giving advisory opinions on hypothetical issues." *Associated Industries of Ky. v. Commonwealth*, 912 S.W.2d 947, 951 (Ky. 1995) (citing *United States v. Fruehauf*, 365 U.S. 146 (1961)).

Here, Martin is serving a 23-year imprisonment sentence. When he filed his motion in circuit court, he was still in prison. At the time of writing

this brief it appears Martin is still in prison serving his sentence. At no point has he been released on a conditional discharge. And, more importantly to his underlying claim, at no point have revocation proceedings been instituted against Martin's conditional discharge, nor has Martin been revoked from his conditional discharge.

Martin's underlying claim involves only the revocation proceedings for conditional discharges. However, Martin may never be subject to the revocation proceedings, and even if he were, he may never be revoked from his conditional discharge. He may never even serve his conditional discharge, as he could die, obtain additional years of imprisonment, abscond from the country, or have any of myriad other circumstances occur in the interim. Furthermore, the revocation procedures in place when and if Martin is ever revoked may be substantially different than they currently are.

"Questions that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy." *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005) (*citing Curry v. Coyne*, 992 S.W.2d 858, 860 (Ky. App. 1998)). "Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it." *Ibid.*

Because Martin's motion concerned an unripe, non-justiciable, hypothetical issue, the trial court lacked subject matter jurisdiction to render an order. Two panels of the Court of Appeals have reached the same conclusion in separate cases regarding motions similar to Martin's. *Rothfuss*

v. Commonwealth, 2015 WL 3826007 (Ky. App. 2015); *Gosnell v. Commonwealth*, 2014 WL 3721282 (Ky. App. 2014). Martin's panel should have reached the same result on his hypothetical issue. The Court of Appeals's opinion and the trial court's order should be vacated as the issue is not ripe for review.

II. Martin's claim is moot.

Should this Court reject the ripeness claim, Martin's claim is moot. The sole issue presented to the trial court in Martin's Motion to Amend was an alleged *Apprendi* violation – could he be subjected to a five-year conditional discharge when a jury had not found him guilty. (TR Vol. II, 244-245). "The U.S. Supreme Court, in Apprendi supra, and Jones v United States, 119 SCt 1215 has decreed that any enhancement beyond statutory limits must be included in an indictment, tried by a jury, and the enhanced punishment must be assigned by the jury." (Martin's Motion to Amend, TR Vol. II, 245).

The DPA was appointed on appeal and attempted to withdraw from the case. Their motion to withdraw was denied, and Martin's appointed counsel filed a brief raising three issues never before presented to the trial court. Following the Court of Appeals's opinion, Martin sought and was granted discretionary review on two issues: the substantive claim regarding revocation proceedings; and a procedural claim involving an alleged "recharacterization" of Martin's pleading.

He now entirely abandons the substantive issue -- the only issue that claimed error with the trial court's order. He now only takes issue with the Court of Appeals's assessment of the motion as an RCr 11.42 motion, which was done for the sole purpose of determining a standard of review. *See* Slip Op. at 3-4 ("Therefore, we are compelled to conclude that the motions were filed pursuant to RCr 11.42, and we may only disturb the decisions of the trial courts if they were clearly erroneous.").

Accordingly, the trial court's resolution of Martin's motion is now moot, as Martin claims no substantive error -- or any error at all -- with the trial court's order.

As there no longer exists a live controversy regarding the trial court's order from which Martin appealed, Martin's appeal is moot. This Court may simply set aside the Court of Appeals's opinion and summarily affirm the trial court's order. *Cf. Commonwealth, Kentucky Board of Nursing v. Sullivan University System, Inc.*, 433 S.W.3d 341, 344, fn 1 (Ky. 2014); KRS 21A.050.

III. The Court of Appeals's Jurisdiction.

Turning to the procedural issue, Martin first claims the Court of Appeals had no jurisdiction to determine whether his Motion to Amend was an RCr 11.42 motion or a CR 60.02 motion. The sole reason the Court of Appeals determined what type of motion Martin had filed was to determine a standard of review. *See* Slip Op. at 3-4 ("Therefore, we are compelled to conclude that the motions were filed pursuant to RCr 11.42, and we may only

disturb the decisions of the trial courts if they were clearly erroneous."). The appellate courts of Kentucky certainly have the authority to make such determinations. *See, e.g., Bowling v. Commonwealth*, 163 S.W.3d 361, 365-366 (Ky. 2005) (treating civil action as CR 60.03 action); *Jackson v. Commonwealth*, 344 S.W.2d 381, 382 (Ky. 1961); *Sherill v. Commonwealth*, 323 S.W.2d 586 (Ky. 1959); *Hamm v. Mansfield*, 317 S.W.2d 172, 173 (Ky. 1958). This claim is without merit.

IV. Martin filed an un-characterized motion, and no court re-characterized it.

Martin next claims the Court of Appeals erred by "recharacterizing" Martin's motion as an RCr 11.42 motion. Martin's "recharacterization" argument misses the mark, though, as Martin's motion to the trial court was never characterized – it cited no procedural rule under which it was filed.

A. Martin's motion was not characterized.

Martin's motion was labeled "Motion to Amend Sentence." (TR Vol. II, 244-245). Martin did not cite to any procedural rule for this motion. Martin made no indication that he desired this motion to be a CR 60.02 motion or an RCr 11.42 motion, or any other rule-based motion. Thus, because Martin failed to cite any procedural rule, Martin's motion was an un-characterized motion.

Though he failed to specify any post-conviction mechanism, his constitutional claim and requested relief aligns with RCr 11.42(1), where a

prisoner may ask "the court that imposed the sentence to vacate, set aside, or correct it." It does not align with CR 60.02, which requires one show "extraordinary" reasons to justify "relie[f] . . . from its final judgment[.]" Martin's motion never states he is suffering from "extraordinary" circumstances. He specifically requested the trial court "vacate the Conditional Discharge portion of his sentence . . . ." (TR Vol. II, 245). He made a straightforward constitutional post-conviction claim that a change in law violated his constitutional rights – a claim that is most appropriately an RCr 11.42 claim.

But placing aside for a moment the best interpretation of this un-characterized motion, the fact remains that Martin's motion is un-characterized and is not explicitly based on any rule of civil or criminal procedure.

Though now he makes novel assertions in his discretionary review brief, and he proffers copious facts that are *not* included in the record on appeal, *see* Brf. at 1-2 ("While preparing to file his RCr 11.42 Motion, he was approached by a "jailhouse lawyer" who convinced him to sign his name to a form motion . . ."), absolutely nothing that was presented to the trial court indicated the motion was a CR 60.02 motion.

In fact, the Commonwealth's response *at the trial court level* put Martin on notice that it did not believe the motion was raised pursuant to CR 60.02. (TR Vol. II, 246)("he still may be able to make a motion under CR

60.02, among other avenues of relief."). Though on notice at the Commonwealth's earliest filing that the Commonwealth did not believe the motion was raised pursuant to CR 60.02, Martin filed no reply to clarify his choice of post-conviction vehicles. Martin waited until his Reply brief before the Court of Appeals to make such a claim -- a point in time when the Commonwealth would have no ability to respond and the trial court could do nothing.

Instead of taking any of these opportunities to specify his motion as a CR 60.02 motion -- even when represented by counsel in the initial filing of his appellant's brief -- Martin instead chose to remain silent about the characterization of his pleading. Martin's "Motion to Amend Sentence" is thus an un-characterized pleading.

This fact is important, as un-characterized *pro se* pleadings are not subject to any notice, warning, or opportunity to amend or withdraw procedures as Martin requests. Martin's own cited cases all affirm that only re-characterization of a labeled *pro se* pleading requires such due process:

- "Defendant concedes that, where a *pro se* pleading is *unlabeled*, a trial court may properly recharacterize it as a postconviction petition." *People v. Shellstrom*, 833 N.E.2d 863, 865 (Ill. 2005) (emphasis added).

- "Federal courts sometimes will ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category. . . .

"In such circumstances the district court must notify the *pro se* litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent §2255 motion will be subject to the restrictions on 'second or successive' motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the §2255 claims he believes he has." *Castro v. U.S.*, 540 U.S. 375, 381, 383 (2003).

- "Recharacterization is unlike 'liberal construction,' in that it requires a court deliberately to override the *pro se* litigant's *choice* of procedural vehicle for his claim." *Castro v. U.S.*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring) (emphasis added).

- "We agree with Smith that converting the wrongly-transferred CrR 7.8 motion to a [personal restraint petition] could infringe on his right to choose whether he wanted to pursue a personal restraint petition . . . ." *State v. Smith*, 184 P.3d 666, 667 (Wash. App. Div. 2, 2008).

Here, there was no re-characterization of Martin's motion -- no conversion of a CR 60.02 motion to an RCr 11.42 motion -- as Martin never chose a post-conviction vehicle for his claim. It was thus incumbent upon the Court of Appeals to determine what post-conviction Rule applied so a standard of review could be utilized. The Court of Appeals liberally construed his claim as an RCr 11.42 claim, as the standard of review for claims arising under CR 60.02 are far more demanding and requires a showing of extraordinary circumstances. *See, e.g., Commonwealth v. Bustamonte*, 140 S.W.3d 581, 583 (Ky. 2004) (CR 60.02 requires a clear showing of extraordinary circumstances and compelling equities, and a trial court's ruling is reviewed for an abuse of discretion).

It was Martin's failure to choose a post-conviction vehicle that placed all courts and parties in the position to determine what characterization to give his un-labeled pleading.

B. The Court of Appeals properly characterized the un-characterized pleading as an RCr 11.42 motion.

Furthermore, the Court of Appeals properly characterized the motion as an RCr 11.42 motion because direct appeal and RCr 11.42 claims precede CR 60.02 claims, and Martin's *Apprendi* claim was more properly a direct appeal or RCr 11.42 claim. *See Vaughn v. Commonwealth*, 258 S.W.3d 435 (Ky. App. 2008) (RCr 11.42 motion); *Meece v. Commonwealth*, 348 S.W.3d 627 (Ky. 2011) (direct appeal); *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010) (direct appeal). *Compare*, *Bowling v. Commonwealth*, 163 S.W.3d 361, 377-378, fn 22 (Ky. 2005) (deciding *Apprendi* issue in CR 60.03 claim only because *Apprendi* rendered 10 years after Bowling's judgment and sentence).

As this Court announced decades ago, Kentucky follows a non-haphazard and non-overlapping structure for attacking the final judgment in a criminal cases. "That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (emphasis in original). "CR 60.02 is not intended merely as an additional opportunity to raise [constitutional]

defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42." *Ibid.*

Gross is explicit that the post-conviction appeals order is (1) direct appeal; (2) RCr 11.42; (3) CR 60.02:

> We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.
>
> Next, we hold that a defendant is *required* to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him.

Gross, 648 S.W.2d at 857 (emphasis added).

Because direct appeals and RCr 11.42 motions should be filed before CR 60.02 motions, a defendant is "foreclose[d] . . . from raising any questions under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings." *Ibid.* If there were no order to the post-conviction appellate process, a defendant would not be barred from raising such claims in his CR 60.02 motion.

Why close off issues in a third-line appellate attack if a defendant can choose to make it his first- or second-line appellate attack? Because "[t]he interrelationship between CR 60.02 and RCr 11.42 was carefully delineated

in *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983)." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). "A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware, or should be aware, during the period when the remedy is available to him." *Ibid.*

A defendant cannot pick and choose an order in which to file his or her post-conviction claims in an effort to avoid procedural bars. The CR 60.02 motion is the final post-conviction motion and is reserved only for issues that could not be raised on direct appeal or in RCr 11.42. "In summary, CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *McQueen*, 948 S.W.2d at 416.

Thus, the only proper characterization of Martin's un-characterized Motion to Amend Sentence, which raises an un-extraordinary, constitutional, collateral attack on his judgment and requests the trial court vacate the conditional discharge portion of his sentence, is an RCr 11.42 motion. The claim was one that could be brought on direct appeal or in RCr 11.42. It made no claims of extraordinary circumstances.

This bar against raising direct appeal and RCr 11.42 claims in a CR 60.02 motion even permits a trial court to treat a CR 60.02 motion as an impermissible, successive RCr 11.42 motion if the CR 60.02 raises claims

"that are of the type ordinarily raised in an RCr 11.42 petition. Thus, in practical effect, Appellant's CR 60.02 motion was indeed . . . an impermissible successive RCr 11.42 motion." *Sanders v. Commonwealth*, 339 S.W.3d 427, 438 (Ky. 2011).

Martin's un-characterized motion most appropriately was interpreted as an RCr 11.42 motion. The Court of Appeals correctly characterized it.

C. Martin's cited cases only concern *characterized* motions.

Martin's cited cases are neither applicable nor "nearly identical." Aplt's Brf. at 11. In *People v. Shellstrom*, 833 N.E.2d 863 (Ill. 2005), a defendant filed a "Motion to Reduce Sentence, Alternatively, Petition for Writ of Mandamus to Order Strict Compliance with Terms of Guilty Plea," listing as respondents the Prison Review Board and the Director of Illinois Department of Corrections. *Id.* at 48-49. The defendant argued that his three-year mandatory supervised release violated his constitutional right to due process because the circuit court never informed him of the three-year period, and the judgment made no mention of the three-year period. The trial court treated the motion as a postconviction petition pursuant to the Illinois Post-Conviction Hearing Act. *Id.* at 49. It dismissed the construed petition as "patently without merit." *Ibid.*

On appeal, the defendant argued his motion was a mandamus action and should have been analyzed accordingly. *Id.* at 50. "Defendant concedes

that, where a *pro se* pleading is *unlabeled*, a trial court may properly recharacterize it as a postconviction proceeding." *Ibid.* (emphasis in original). However, because the defendant specifically invoked the mandamus statute and never referred to the post-conviction act, he argued it should not have been recharacterized. *Ibid.*

The Illinois Supreme Court rejected the argument, holding that a trial court may recharacterize a *pro se* pleading as one brought under the postconviction act if the "pleading alleges a deprivation of constitutional rights cognizable under the Act[.]" *Id.* at 51. However, it adopted a three-part procedure for such recharacterization: (1) notice of intent to recharacterize; (2) admonishment of effects of recharacterization; (3) opportunity to withdraw or amend the pleading. *Id.* at 57-58.

The only "nearly identical" aspect of Martin's case to *Shellstrom* is that the defendant in *Shellstrom* would agree that Martin's uncharacterized pleading may be characterized as an RCr 11.42 motion. Otherwise, Martin's case is inapposite *Shellstrom*: (1) Martin did not label his motion; (2) Martin did not file a mandamus action; (3) Martin did not name as opposing parties the DOC or the warden; (4) and Martin did not respond at the trial court level to the Commonwealth's assertion that his motion was *not* a CR 60.02 motion.

State v. Smith, 184 P.3d 666 (Wash. App. 2008) is also factually incongruent. There, a defendant had filed a CrR 7.8 motion, which the trial court had dismissed. The appellate court vacated the trial court's order and remanded for the trial court to comply with a criminal rule change that required it to transfer certain post-conviction appeals to the appellate court. "Here, the superior court denied Smith's motion because it was untimely. The superior court did not have authority to deny an untimely motion and, thus, we vacate the order and remand . . . ." *Id.* at 864.

In *obiter dicta*, the court addressed the prosecution's *appellate* argument that the inmate's CrR 7.8 motion should be *converted on appeal* to a personal restraint petition "as a way of preserving judicial resources." *Id.* at 863. It rejected the prosecution's argument, noting that "converting the wrongly-transferred CrR 7.8 motion to a PRP could infringe on his right to choose whether he wanted to pursue a personal restraint petition because he would then be subject to a successive petition rule in RCR 10.73.140 as a result of our conversion of the motion." *Id.* at 864.

In stark contrast, Martin filed a "Motion to Amend Sentence" that cited no rule-based authority for the motion, claimed the conditional discharge portion of his judgment was unconstitutional, and asked the court "to vacate the Conditional Discharge portion of his sentence . . . ." (TR Vol. II, 244-245). At the trial court level the Commonwealth noted Martin had other

avenues for appeal, including a CR 60.02 motion. On appeal, the Commonwealth's brief in its Counterstatement of the Case noted parenthetically that the motion was an RCr 11.42 motion because it asked to vacate a portion of the sentence. *See* RCr 11.42 (1) (noting a prisoner may file an RCr 11.42 motion "to vacate, set aside or correct" the sentence). After Martin argued in his Reply brief -- for the first time ever -- his motion was a CR 60.02 motion, the Court of Appeals properly and liberally construed the motion as an RCr 11.42 motion and analyzed the issue under that more lenient standard. Martin's case is wholly dissimilar from *Smith*.

Dorr v. Clarke, 733 S.E.2d 235 (Va. 2012), is likewise inapposite to Martin's case for similar factual reasons:

> Here, Dorr field a motion for mandamus to compel VDOC to comply with the circuit court's sentencing order dated April 22, 2010.
>
> Clarke moved to dismiss Dorr's petition, recharacterizing his motion as a petition for a writ of habeas corpus. Dorr responded that he sought mandamus relief, not habeas corpus relief, and requested the circuit court deny Clarke's motion.
>
> The circuit court then recharacterized Dorr's motion, without providing him notice or an opportunity to be heard, and ordered that his petition be dismissed.

Id. at 241-242 (paragraph breaks added).

Finally, *Castro v. United States*, 540 U.S. 375 (2003), is factually inapposite. There, Castro filed a FRCP 33 motion for a new trial. *Id.* at 378.

In response, the United States claimed the motion was more properly a habeas corpus action under 28 U.S.C. § 2255. *Ibid.* The district court and the court of appeals both treated the motion as having been brought under FRCP 33 and 28 U.S.C. § 2255. *Ibid.* On appeal, the United States Supreme Court held that re-characterizing the motion without giving notice, admonishment, and opportunity to withdraw, would have the effect of estopping the government from using the second or successive bar to a future 28 U.S.C. § 2255 claim.

Martin's claim is substantially different, as his initial motion was not filed explicitly pursuant to any rule or statute. No court re-characterized his pleading. Martin has argued at length both in the Court of Appeals and in this Court that his motion should be characterized as a CR 60.02 motion. None of the defendants in Martin's cited cases had to make any argument about what initial characterization the motion was filed under, as they all explicitly stated under what rule or authority they were filing.

Martin's motion was filed under no explicit rule. Thus, as Martin's own cited case admits, "where a *pro se* pleading is *unlabeled*, a trial court may properly recharacterize it as a postconviction proceeding." *People v. Shellstrom*, 833 N.E.2d 863, 867 (Ill. 2005) (emphasis in original).

Its composition, content, and prayer for relief most closely fit with an RCr 11.42 motion, as the Court of Appeals correctly held. This case should be affirmed.

CONCLUSION

Martin's claim is unripe, moot, and otherwise fails. Martin field an uncharacterized motion that the Court of Appeals properly construed as an RCr 11.42 motion.

WHEREFORE, the Commonwealth respectfully requests the Court AFFIRM the trial court's order denying Martin's motion.

Respectfully submitted,

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